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April 24, 1991

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RECEIVED

APR 25 1991

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Donna R. Searcy, Secretary
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Re: Benchmark Communications Corporation.
FCC File No.: BPH-891228MT.
Our File No.: 9612.

Dear Ms. Searcy:

Oh behalf of Benchmark Communications Corporation, enclosed please find an original and four copies of an opposition to the petition to deny the above-referenced application.

If there are any questions about this petition, please communicate with the undersigned.

Respectfully submitted,



Matthew L. Leibowitz
Counsel for
Benchmark Communications Corporation

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APR 29 1991
FM EXAMINERS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

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APR 25 1991

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Application of

BENCHMARK COMMUNICATIONS
CORPORATION

For Construction Permit for a new
FM Station to operate on
Channel 291C3 in Chatom,
Alabama.

File No.: BPH-891228MT

To: Roy J. Stewart, Chief
Mass Media Bureau

OPPOSITION TO PETITION TO DENY

1. Benchmark Communications Corporation ("Benchmark"), by its counsel, hereby opposes the Petition to Deny the above-captioned application filed by Charles Esposito d/b/a Hap-Hazard Broadcasting ("Hap-Hazard"), on April 1, 1991.

STANDING

2. Benchmark filed its application on December 28, 1989 pursuant to a Report and Order, MM Docket No. 86-55,4 FCC Rcd. 7556 (1989) which created a filing window between December 1, 1989 and January 2, 1990 for the upgraded allotment at Chatom. Benchmark's application was the only application filed during the specified window.

3. Two other Chatom applications were untimely filed in March, 1990 and are not available for processing pursuant to Rule 73.3773(f). Hap-Hazard's application is one of these untimely applications. Accordingly, Hap-Hazard has no standing, as merely an applicant, whose application is barred from being processed, to protest Benchmark's application.¹

¹ See Amherst Broadcasting, Inc., 46 RR 2d 497 (1979).

BACKGROUND

4. The history of this proceeding is complex and spans seven (7) years. This station was originally authorized to a different permittee, and was to operate on a different frequency.² However, in order to accommodate another stations's upgrade, the original permittee consented to a proposed modification from channel 276A to channel 254A.³ Both this modification proposal, a Commission proposed alternate, and a proposed class C2 upgrade turned out to conflict with options being advocated in two other proceedings, involving multiple proposals and counter-proposals,⁴ but the Commission eventually substituted channel 291A at Chatom.

5. Shortly after initiating the channel substitution request, the original permittee had sold her rights in WCCJ to Benchmark.⁵ Benchmark wanted to construct WCCJ promptly. Indeed it had on hand much of the equipment required for that purpose. But the pendency of the contested rule makings cast considerable uncertainty about what facilities should be built and where. Under the circumstances, Benchmark sought and received two extensions of WCCJ's construction permit.⁶ It must be noted that action on the second extension application was deferred for more than 19 months, reflecting the continuing uncertainty of even the staff

² The original permittee was June G. Fuss, and the original assignment was on channel 276A. See File No. BPH-840423ID.

³ See RM-4929, MM Docket No. 85-387.

⁴ See MM Docket Nos. 83-493 (Gulf Breeze, Florida, et al.) and 86-55 (Atmore, Alabama, et al.).

⁵ See File No. BAPH-850215HK, granted June 17, 1985.

⁶ See File No. BMPH-850924JR, granted November 18, 1985 (Report No. 19667, released November 26, 1985); and File No. BMPH-860417JG, granted October 6, 1987 (Report No. 20177, released October 19, 1987).

about where and when WCCJ could be built.

6. Once the allotment question had been resolved and WCCJ's permit extended, Benchmark moved promptly to commence construction. However, impediments outside its control prevented completion in the short period--only six (6) months--allowed. These circumstances and Benchmark's efforts to overcome them were described in several previous pleadings.⁷

7. On March 25, 1988, Benchmark once again filed for a further extension of time to construct station WCCJ (BMPH-880325JC). That application was denied by letter of Larry Eads, Chief, Audio Services Division, dated January 19, 1989. As a result thereof, Benchmark timely filed a petition for reconsideration on March 2, 1989.

8. However, after the petition for reconsideration was filed and prior to any ruling on the petition, the Policy and Rules Division finally acted on the complex allotment request which, inter alia, upgraded the Chatom channel from a class A to a class C3 and announced a filing window under the upgraded allotment.

9. To protect its rights on appeal by virtue of the petition for reconsideration which was still pending, and at the same time to protect its future right to compete for the new allotment, Benchmark filed the instant application. In doing so, it requested that the application be treated as a minor change of the facilities of WCCJ or in the alternative, as a

⁷ See File No. BMPH-880325JC (Attachment E hereto); an amendment thereto dated May 26, 1988 (Attachment F); Benchmark's Opposition to a "Petition to Deny" its extension application (Attachment G); the August 8, 1988 letter response to the staff's July 20, 1988 inquiry, including a "State of Construction of WCCJ" report (Attachment H); and Benchmark's December 20, 1988 "Pleading for WCCJ" (Attachment I).

new application.⁸ This approach was necessitated by the failure of the Policy and Rules staff to recognize that the effect of accepting new applications during the pendency of Benchmark's appeal was to nullify Benchmark's rights for consideration of its petition for reconsideration.

10. Even Hap-Hazard, on page two (2) of its petition to deny recognized the complex background: "The history of the Chatom channel has not been uncomplicated." Nevertheless, Hap-Hazard faults Benchmark and argues that the instant application was somehow untimely filed. This assertion places form over substance, and fails to recognize Benchmark's procedural dilemma created by the uncoordinated FCC staff actions. Accordingly, Benchmark should not be penalized for trying to protect its rights, and the application must be processed as timely filed.⁹

SUBSTANTIVE ISSUES

11. When you wade through Hap-Hazard's "not uncomplicated" petition, the only allegations of substance concern misrepresentations. Hap-Hazard attacks Benchmark first for failing to adequately disclose in the instant application the alleged misrepresentations raised in Larry Eads' letter of January 19, 1989, and secondly the allegations themselves raised by Eads.

12. Concerning disclosure in the instant application, Benchmark clearly referred to the alleged misrepresentations and reported that the Commission had denied its extension

⁸ Benchmark also submitted the full fee of \$1,800 for a new-station Form 301.

⁹ Hap-Hazard also in a cursory manner suggests that Benchmark should be penalized for the delay to construct the initial facility, and suggests that Benchmark's prospective ability to timely construct the new facility is somehow tainted. Such speculative arguments fail to meet the pleading requirements of See Section 309(d) of the Communications Act of 1934, as amended, and must be summarily rejected.

application without reaching the merits of the allegations in an exhibit entitled "Broadcast Interests". These statements are accurate and put any reader on notice of the relevant facts. Moreover, this application, in part, was filed as a modification application in the same proceeding and before the very same FCC staff where the alleged misrepresentations took place. No more is required, and Hap-Hazard is merely blowing smoke with this flimsy accusation.

13. With respect to the questions raised in the Eads letter of January 19, 1989, Benchmark previously filed an extensive response and supplement as part of its petition for reconsideration. However, the FCC staff never ruled on this material since the petition for reconsideration was voluntarily withdrawn, to allow for the prosecution of the instant application.¹⁰ Accordingly, Benchmark sets forth the facts to allow the staff to fully evaluate the erroneous allegations of misrepresentations.

DILIGENT CONSTRUCTION EFFORTS

14. Site lease: Benchmark's first priority was to update and formalize its predecessor's arrangements to use the authorized transmitter site, which had been made almost four years earlier. It instructed its local attorney to do so,¹¹ and he approached the site owner's trustee¹² by letter of December 4, 1987. The trustee responded on December 29, 1987 (see Attachment A-1), and negotiations proceeded to an agreement in principle by January 25, 1988 (see Attachment A-2). A draft lease was circulated on February 18, 1988 (see Attachment A-3), and a substantially identical lease (except for elimination of a renewal option) was

¹⁰ See letter to Donna R. Searcy, dated June 21, 1990 from John M. Spencer.

¹¹ Benchmark's principals reside in Miami, Florida, and Akron, Ohio. It was therefore decided to assign this task to a local representative rather than try to handle it by long distance.

¹² The site is owned by a family trust administered by the trust department of a Mobile bank.

executed on March 1, 1988 (see Attachment A-4).

15. This process took so long for several reasons, including: (1) the passage of substantial time since the initial assurance of site availability; (ii) institutional delays inherent in dealing with a bank trust department; (iii) delays in securing approval of the lease from scattered trust beneficiaries; and (iv) the trust's special concerns about minimizing impact of the WCCJ facility on use of the site as a tree farm. These factors were all beyond Benchmark's ability to accelerate.

16. Site Preparation: Nevertheless, Benchmark did not sit idly by waiting for final lease arrangements. By mid-December Benchmark had retained a local surveyor to survey the site and develop a suitable site plan, and on December 17, 1987 the surveyor completed his survey of the tower site and an access easement (see Attachment B-1). On December 20, 1987 Benchmark principal John Raymond Meyers travelled from Miami to Chatom to meet with Benchmark's attorney and surveyor to ensure that every effort was being made to move things forward. (See Attachment B-2 for copies of two motel receipts reflecting this trip.)

17. By mid-January the surveyor had staked out the tower base and guy anchor locations. The following week Meyers returned to Alabama to begin preliminary construction, in anticipation that lease negotiations would continue favorably. In Mobile on the morning of January 20, 1988 he purchased concrete mix for the tower foundation (see Attachment C-1), then drove to Chatom, dug a hole for the tower foundation, placed steel reinforcing bar (which he had brought from Florida Structural Steel in Dania, Florida) in the hole, and mixed and poured concrete for the tower foundation. He described this work more fully in Benchmark's August 8, 1988 response to the staff's inquiry (see Attachment H). He also brought with him--but did not install because he did not have the necessary power equipment--earth

auger-type screw-in guy anchors (see the invoice for these anchors at Attachment C-2). (See Attachment C-3 for a copy of a motel receipt from this trip.)

18. Further site preparation was not possible until after the lease was in effect.

19. Equipment trailer: Meyers originally located a suitable 12' x 60' trailer for WCCJ's broadcasting equipment in Gulf Breeze, Florida, during his December 1987 trip. As described more fully in Attachment H, he met the trailer owner again during his January 1988 trip. They reached agreement for Benchmark to buy the trailer, with the seller to strip it out and deliver it to the Chatom site by mid-March, with payment due after delivery. Meyers telephoned the seller again in February to check on his progress, and was assured the renovation and delivery were on schedule.

20. Meyers believed all had gone well until late March, when his surveyor reported the trailer had not been delivered. Meyers telephoned the seller, who said he had taken it to Chatom but could not get it into the site. However, no Benchmark representative was present during the claimed delivery attempt, and Meyers believes the seller damaged the trailer trying to move it out of Gulf Breeze.

21. To resolve this problem, Benchmark decided to use a much smaller (8' x 24') and thus less desirable trailer Meyers already owned and had previously used as a remote broadcast studio. Meyers rented a truck in Miami and drove the trailer from Melbourne, Florida, where he had stored it, to Chatom in May 1988 (see paragraph 18 below). The trailer was installed on the site on May 16, 1988.

22. Tower: Benchmark experienced similar difficulty with its tower. Meyers located

a suitable 280-foot utility tower in a Melbourne, Florida, salvage yard in early January 1988. He inspected the tower at that time and arranged to have it shipped to Chatom the first week in March 1988. When he visited the seller again the week of March 14-20, Meyers found that the tower had indeed been shipped. However, upon his return to Miami, Meyers learned on March 21 that a different tower (only 160 feet tall) had somehow been shipped, and to Miami instead of Chatom, and that delivery had been refused on March 14.

23. On May 19 Benchmark located another suitable tower in Missouri, but it subsequently purchased a better tower from Bonner Tower Service of Lake Worth, Florida (see Attachment D-1). Meyers has stored this tower in Melbourne, and is ready to install it upon reinstatement of Benchmark's construction permit. (Benchmark obviously has no FCC permit to erect a tower at this time, and prefers not to store the unassembled tower sections unprotected at the Chatom site.)

24. Other equipment: Meyers is a broadcast engineer who has had years of experience building radio stations. In this connection he has an extensive inventory of broadcast equipment of all types. While he acquired a Gates transmitter that can be used to place WCCJ in operation in March 1988, Benchmark prefers to install a newer transmitter. Thus the statement regarding transmitter status in its "State of Construction of WCCJ" (see Attachment H) simply reflected Benchmark's intention to use the best equipment available at the time of construction, and not to suggest that it had not yet secured a usable transmitter.

25. Meyers fabricated an antenna for WCCJ by reassembling parts from an antenna previously used at station WFTL (Fort Lauderdale), including a power divider refurbished by Jampro Antennas, Inc. (See Attachments D-2 and D-3 for copies of the checks for antenna parts bought from stations WDNA and WFIT, where they had been used after being taken out

of service at WFTL.) Transmission line was bought from Breit's Tower Service in Miami.

26. Equipment summary: In summary, most of the equipment required to place WCCJ on the air was available by March 1988, as reported in the instant extension application, and all required equipment has been arranged for or actually on hand since late June 1986. In fact Meyers himself delivered most of this equipment to Chatom when he transported the station's equipment trailer to the site on May 16, 1988. (A copy of the receipt for the Ryder truck rental was provided with the August 8, 1988 filing. It and other receipts from this trip are included here as Attachments D-4 and D-5.)

27. Other construction efforts: Finally, initial problems in securing electric power at the WCCJ site have long since been resolved. Once Benchmark discovered that its access easement was not sufficient for installation of electric power poles and lines, it promptly made the necessary arrangements. That process would have continued to completion but for the Commission's June 9, 1988 rescission of its grant of a permit extension. Benchmark has been assured that construction can be completed and service turned on within approximately 30 days. Moreover, when it appeared that electric service delays might delay initiation of service, Benchmark purchased an emergency generator to power the station, as it had proposed in its application to acquire WCCJ (see Attachment D-6).

28. Other Matters: Benchmark freely acknowledges the error of assuming that its initial trailer and tower suppliers were meeting their commitments. However, Benchmark remains troubled by the Commission's apparent tacit acceptance of broad generalizations in Larry Eads' letter which Hap-Hazard merely echoes--that Benchmark was not making progress toward construction and in fact had wilfully misrepresented its efforts. These charges were for the most part based on R. Dale Gehman's not being able to find something he did not know

what to look for (i.e., a flush, in-ground concrete tower base, overgrown by vegetation after more than three months of a Gulf spring)¹³ and by a misinterpretation of Benchmark's statement that equipment was "on hand" as meaning that it was on-site. However, the record of Benchmark's efforts to move from ground zero to active construction simply does not bear out the conclusion of no meaningful action to provide service to the public, or for that matter the staff's conclusion of "literally no progress prior to the expiration of the construction permit on April 6, 1988." Substantial progress was made before April 6, and it must be reiterated that what was accomplished occurred in the less than six months allowed under the prior extension.

29. In light of the above, it can only be concluded that Benchmark was in fact proceeding in good faith to construct WCCJ and any errors in its previous submissions were oversights and not intended to mislead the Commission. In fact, the bottom line was that Benchmark had made substantial progress in the construction of the facility. Accordingly Benchmark had not misrepresented the overall status of construction.

CONCLUSION

Accordingly, Hap-Hazard's petition to deny must be dismissed as procedurally defective, and as an informal objection is must be denied as not raising any substantial question of Benchmark's qualifications or willingness to construct and operate the station it has applied for, and Benchmark's application must be granted forthwith.

Respectfully submitted,



Matthew L. Leibowitz
Counsel for
Benchmark Communications Corporation

April 25, 1991

¹³ See letter to Larry Eads from John M. Spencer, dated April 17, 1989, a copy of which is attached hereto.

ORIGINAL

ATTACHMENT A



First Alabama Bank
Mobile
Post Office Box 2527
Mobile, Alabama 36622-0001

Trust Department

December 29, 1987

Mr. David Michael Huggins
Turner, Underdonk & Kimbrough, P.A.
P. O. Drawer 1389
Chatom, Alabama 36518

RE: Martha Annie Jordan Income Trust

Dear Mr. Huggins:

We acknowledge receipt of your letter of December 4, 1987 and location plat in regard to a proposed radio transmission tower site.

After a careful review of your proposal, we regret to advise you that we cannot recommend it for approval.

If your client, Benchmark Corporation, Inc., would be interested in a lease arrangement for a primary term of five years at an initial up front payment of \$10,000.00 plus annual payments of \$1,000.00 per year under the terms of a properly drawn lease agreement, we will communicate your offer to the beneficiaries.

If you need additional information or have further questions, please feel free to contact us at your convenience.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "Donald L. Harper", written over the typed name.

Donald L. Harper
Vice President/Mobile
Trust Officer & Woodlands Manager

DLH/sr

TURNER, ONDERDONK & KIMBROUGH, P. A.

LAWYERS

100 CENTRAL AVENUE

CHATOM, ALABAMA

EDWARD P. TURNER, JR.
A. MICHAEL ONDERDONK
W. A. KIMBROUGH, JR.
GORDON K. HOWELL
HALRON W. TURNER
FRANK WOODSON
DAVID MICHAEL HUGGINS*
BRAXTON COUNTS III

January 29, 1988

MAILING ADDRESS
P. O. DRAWER 1389
CHATOM, AL. 36518
TELEPHONE (205) 847-2237

*ADMITTED IN ALABAMA & MISSISSIPPI

Mr. Raymond Meyers
Benchmark Communications Corp.
4700 Southwest 75th Ave.
Miami, Fla. 33155

Re: WCCJ, Inc.

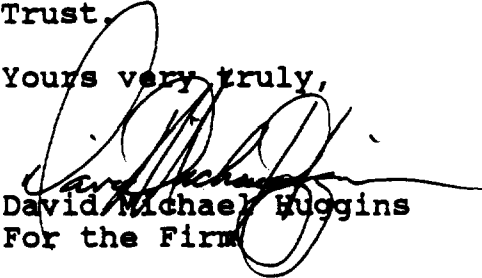
Dear Ray:

This letter will confirm our telephone discussions of January 25, 1988, wherein I indicated that it appears that we have reached an agreement in principle with the Trustee for the Martha Annie Jordan Income Trust to lease five (5) acres of high ground in the area of interest for a yearly rental of Two Thousand (\$2,000.00) Dollars per year and, in an effort to offset any expenses in start-up, the lease rental payments will be made in advance providing the Trust with Two Thousand (\$2,000.00) Dollars in rental payment upon the execution of a Lease Agreement. I am endeavoring to complete the Lease Agreement for transmittal to the Trust in the very near future and we are preparing for an on sight inspection by the Trust officers with Mr. Schell sometime next week.

Enclosed please find a copy of the survey prepared by Robert Schell of the Chatom Radio Tower site and the right-of-way across the Trust property providing access for your employees. As this survey may be necessary for your efforts to design the layout of the facilities, I felt I should transfer this to you immediately upon receipt and although the survey is dated December 17, 1987, I have received it just recently.

Should you have any questions, please feel free to contact me at your convenience and be assured that you will hear from me shortly after the on sight inspection and a copy of the proposed Lease Agreement will be forwarded to you prior to transmittal to the Trust.

Yours very truly,


David Michael Huggins
For the Firm

DMH:awg

Enclosure.

TURNER, ONDERDONK & KIMBROUGH, P. A.

LAWYERS

1359 DAUPHIN STREET

MOBILE, ALABAMA

36604

EDWARD P. TURNER, JR.

A. MICHAEL ONDERDONK

W. A. KIMBROUGH, JR.

GORDON K. HOWELL

HALRON W. TURNER

FRANK WOODSON

DAVID MICHAEL HUGGINS*

BRAXTON COUNTS, III

*ADMITTED IN ALABAMA & MISSISSIPPI

MAILING ADDRESS

P. O. BOX 2821

MOBILE, AL. 36652

TELEPHONE 205-432-2855

February 18, 1988

Mr. Raymond Myers
Benchmark Communications Corp.
4700 SW 75th Avenue
Miami, FL 33155

Mr. Don Harper
First Alabama Bank, Trust Department
Post Office Drawer 2527
Mobile, AL 36622

Re: Real Property Lease

Gentlemen:

Enclosed please find a proposed form for the ground lease to cover the acreage to be utilized by WCCJ, Inc., in the operation of its radio transmission facility in Washington County, Alabama, upon properly held by the Martha Annie Jordan Income Trust. I believe all provisions have been included in this agreement which were requested by Mr. Harper with regard to the obligation to restore the property and the indemnification against loss or damages as a result of the activities of WCCJ, Inc.

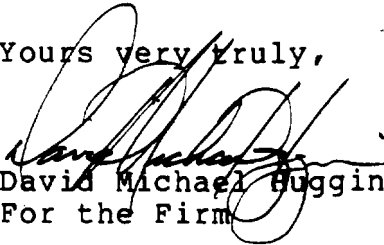
I have included within this form an option to renew which you may wish to strike from the final draft unless the trust would be willing to provide this option at some stipulated future lease payment.

This proposed form has been sent to each of you at the same time for review and revision. Once you have had an opportunity to read this document, please contact me at your convenience to discuss the same so that I may hammer out the final agreement as soon as possible so that construction may begin.

February 18, 1988
Page 2

I look forward to hearing from you soon in this regard.

Yours very truly,



David Michael Huggins
For the Firm

DMH/tjp
Enclosure

STATE OF ALABAMA

COUNTY OF WASHINGTON

REAL PROPERTY LEASE

THIS LEASE is made and entered into on this the _____ day of _____, 1988, by and between First Alabama Bank of Mobile, Alabama, as Trustee of the Martha Annie Jordan Income Trust (hereinafter referred to as "Lessor"), and WCCJ, Inc., an Alabama Corporation whose principal place of business is in the city of Chatom, Washington County, Alabama, 36518, (hereinafter referred to as "Lessee").

ARTICLE I

DEMISE OF LEASED LAND

1.01 Leased Land: Lessor, for and in consideration of the rents, covenants, and conditions herein contained to be kept, performed, and observed by Lessee, does lease and demise to Lessee, and Lessee does rent and accept from Lessor, the real property, referred to herein as the "Leased Land" including a right-of-way and surface easement providing access more particularly described on Exhibit "A" attached hereto and made in part hereof for all purposes.

1.02 Lessor's Warranty of Title: Lessor hereby represents and warrants that Lessor is the owner in fee simple absolute of the leased land subject to covenants, conditions, restrictions, easements and other matters of record. Lessor makes no representation or warranties that the tract or conditions beneath the tract are suitable for any particular purpose, including the

construction of a radio transmission tower, and the construction or operation of a radio transmission facility to be constructed on the leased land as more particularly described hereinabove.

1.03 Lessor's Warranty of Quiet Enjoyment: Lessor covenants and agrees that Lessee, on paying the rent and other charges herein provided for and observing and keeping the covenants, conditions and terms of this lease on Lessee's part to be kept or performed, shall lawfully and quietly hold, occupy and enjoy the leased land during the term of this lease without hinderance or molestation of Lessor or any person claiming under Lessor.

ARTICLE II

LEASE TERM

2.01 Primary Lease Term: This lease shall be for a term of five (5) years, referred to herein as the "Primary Lease Term", commencing as of the day and date first above written and expiring at 5:00 P.M. on the day and date exactly five (5) years therefrom.

2.02 Option to Renew and Extend Lease: Lessee shall have the option to renew and extend this lease for up to an additional _____ years on the basis of a single _____ year renewal term or in such increments as Lessee shall desire from time to time, which in the aggregate, shall not be more than _____ years, under all the terms and conditions of this lease upon thirty (30) days prior written notice to Lessor of Lessee's intention to Lessor to renew and extend this lease

2.03 Holdover: If Lessee shall holdover after the expiration of the primary lease term, or any subsequent renewals or extensions

thereof, such tenancy shall be from month to month on all the terms, covenants and conditions of this lease.

ARTICLE III

RENT, TAXES AND UTILITIES

3.01 Rental During Primary Term: Lessee agrees to pay Lessor Two Thousand and no/100 (\$2,000.00) Dollars per year as rental for the use and occupancy of the leased lands during the primary term of this lease, said rental to be paid in advance of each year next succeeding the date of this Lease.

3.02 Rental Payments Upon Renewal: Lessee agrees to pay Lessor _____ as rental for the use and occupancy of the leased lands upon renewal.

3.03 Lessee to Pay Taxes: Lessee agrees to pay all real property taxes, special taxes, or assessments and all property taxes on the personal property located on the leased land, levied or assessed upon or against the leased land during the lease term of any extension or renewal thereof and if, for any reason, Lessee fails to pay such taxes when due, Lessor shall reserve the right to pay such taxes on behalf of the Lessee and, Lessee shall, within thirty (30) days of Lessor's invoice, reimburse Lessor for such taxes and any interest and/or penalties thereon.

3.04 Lessee to Pay Utility Charges: Lessee shall pay or cause to be paid all charges for water, heat, gas, electricity, sewers, and any and all other utilities used upon the leased lands throughout the term of this lease and any extension or renewal thereof, including any connection fees.

ARTICLE IV

USE OF PREMISES

4.01 Primary Use: Lessee intends and shall use the leased lands under this lease to build a facility for radio transmission purposes, being an FM station to be known by the call letters WCCJ. Lessee shall not build, operate or otherwise utilize the leased lands under this lease for any other purpose which may in any way diminish the value of said leased lands to Lessor.

4.02 Termination if Use Becomes Unlawful, Impossible, or Impracticable: If it is or becomes unlawful for Lessee, or anyone holding under Lessee directly or indirectly, to conduct any particular operation or to erect or maintain any particular structure or equipment on the leased land, or if any part of the leased land or the approaches thereto are condemned, zoned or changed by public authorities; or if it becomes impossible or impracticable to use the leased land or its primary use, then Lessee shall have the right at any time thereafter to terminate this lease by giving Lessor thirty (30) days notice in writing of such termination.

ARTICLE V

LEASE TERMINATION

5.01 Lease Termination: This lease shall terminate, without any right of renewal, on the date specified hereinabove for the termination of the primary term if renewal has not been made by written notice as specified hereinabove.

5.02 Termination by Lessor: Lessor shall have the right to terminate this lease upon written notice to Lessee, and the lease shall terminate on the date specified in such notice, upon the occurrence of any one or more of the following:

(a) Lessee fails to make lease payments due under this agreement when due or cure the default of failure to make said lease payments within thirty (30) days from the date such payments are due.

(b) Lessee assigns, sells or otherwise transfers its rights under this lease without Lessor's express prior written approval.

5.03 Termination by Lessee: Lessee shall have the right to terminate the lease upon at least sixty (60) days prior written notice to Lessor, and the lease shall terminate on the date specified in such notice.

5.04 Rights and Obligations Upon Lease Termination: Upon the expiration of the primary term of this lease or any extensions or renewals thereof as herein provided or upon termination of this lease as hereinabove provided or upon termination for any other reason as herein provided:

(a) Lessee shall promptly and at Lessee's expense, upon request by Lessor:

(i) remove the facilities, including, but not limited to, all towers, supports, buildings and foundations from the leased lands,

(ii) restore the leased lands to the condition in which Lessee received them under this Agreement,

Until such time as Lessee has removed the facilities, and restored the leased lands, Lessee shall continue to pay all rentals and taxes on the leased lands as provided in this Agreement. Lessee shall not be entitled to any refund of lease payments made under the terms of this Agreement and any such payments are forfeited in favor of the Lessor.

ARTICLE VI

CONSTRUCTION BY LESSEE

6.01 Lessee's Right to Build - General Conditions: Lessee shall have the right, at any time and from time to time during the term of this lease and any extension or renewal thereof, to erect, maintain, alter, remodel, reconstruct, rebuild, replace, and remove buildings and other improvements on the leased land, and correct and change the contour of the leased land, subject to the following conditions:

(a) The cost of any such construction, reconstruction, demolition, or any change, alteration, or improvements shall be borne and paid by the Lessee.

(b) The leased land shall at all times be kept free of mechanics and materialmens liens.

(c) Lessor shall receive copies of architect's drawings showing the exterior appearance and dimensions of major improvements.

(d) Lessor shall be notified at the time of commencement of any work.

(e) Lessee shall design and operate the radio transmission

facility to be constructed under the provisions of this agreement consistent with good engineering practices.

ARTICLE VII

MAINTENANCE AND REPAIR OF LEASED PREMISES

7.01 Lessee's Duty to Maintain and Repair: Lessee, at Lessee's own cost and expense at all times during the term of this lease or any extension or renewal thereof shall maintain, or cause to be kept and maintained, all buildings and improvements which may be erected upon the leased land in a good state of appearance and repair, reasonable wear and tear excepted.

7.01 Lessee shall be given a common key to the gate controlling access to the Leased Land and shall maintain control over said key and not allow its distribution beyond the agents, servants or employees of the Lessee.

ARTICLE VIII

INDEMNITY

8.01 Lessee, in consideration for this lease agrees that it will indemnify and hold Lessor harmless against the claims of all persons whomsoever and against all liability, loss or damage Lessor may suffer as a result of Lessee's operations on the Leased Land pursuant to this Agreement.

ARTICLE IX

ASSIGNMENT AND SUBLEASE

9.01 Consent of Lessor: Lessee may not assign or sublease its rights under this lease without the express written consent of Lessor, which consent shall not be unreasonably withheld.

ARTICLE X

GENERAL PROVISIONS

10.01 Conditions and Covenants: All of the provisions of this lease shall be deemed as running with the land, and construed to be "conditions" as well as "covenants" as though the words specifically expressing or imparting covenants and conditions were used in each separate provision.

10.02 No Waiver of Breach: No failure by either Lessor or Lessee to insist upon the strict performance by the other of any covenant, agreement, term, or condition of this lease or to exercise any right of remedy consequent upon a breach thereof shall constitute a waiver of any such breach or of any such covenant, agreement, term or condition. No waiver of any breach shall affect or alter this lease, but each and every covenant, condition, agreement and term of this lease shall continue in full force and effect with respect to any other then existing or subsequent breach.

10.03 Successors in Interest: Each and all of the covenants, conditions and restrictions in this lease shall enure to the benefit of and shall be binding upon the successors in interest of Lessor and, subject to the restrictions of Article VII, the successor in interest of Lessee.

10.04 Entire Agreement: This lease contains the entire agreement of the parties with respect to the matters covered by this lease and no other agreement, statement, or promise made by

any party, or to any employee, officer, or agent of any party, which is not contained in this lease shall be binding or valid.

10.05 Severability: If any provision of this lease shall be held invalid under any applicable laws, such invalidity shall not affect any other portion of this lease that can be given effect without the invalid provision and to this end, the provisions hereof are severable.

IN WITNESS WHEREOF, the parties hereto have caused this lease to be duly executed as of the day and year first above written.

LESSEE

WCCJ, INC.

By: _____

Its _____

ATTEST:

LESSOR

FIRST ALABAMA BANK AS TRUSTEE OF THE
MARTHA ANNIE JORDAN INCOME TRUST

By: _____

Its _____

ATTEST:
